No. 82-1548

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARY J. EPPS,

Petitioner,

v.

DAVID BAER, INDIVIDUALLY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT DOUGLAS JONES,
504 Maryland Trust Bldg.,
Baltimore, Maryland 21202,
539-0155,
Counsel for Petitioner.

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a taxpayer's action against an Internal Revenue Service employee for violation of civil Constitutional Rights, the employee's consultation with and compliance with the advice of the Service's legal counsel establish as a matter of law the employee's defense of qualified immunity?

2. Whether, in May of 1973 and thereafter, the law was clearly established so that an experienced Internal Revenue Service Field Branch Manager could, as a matter of law, be fairly said to have known that it was forbidden to use his tax collection powers to advance the objectives of the Justice Department and to make decisions effecting a taxpaper's property based upon Justice Department considerations rather than tax

collection considerations?

TABLE OF AUTHORITIES

Dellums v. Powell, 566 F. 2d. 167, 184 U. S. App. D. C. 275, cert. denied 98 S. Ct. 3146, 438 U. S. 916, 57 L. Ed. 2d 201 (Dist. Col. Cir. 1977). . . 7,8

Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982). 7,9,10

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No.

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OCTOBER TERM, 1982

MARY J. EPPS,

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DAVID BAER, INDIVIDUALLY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

On March 15, 1982, Judge Shirley B. Jones of the United States District Court for the District of Maryland issued a Memorandum and Order granting the Motion of David Baer for Judgment Notwithstanding Verdict, a jury verdict having been returned against Baer on October 1, 1981, in the amount of $100,000.00 compensatory and $100,000.00 punitive damages. On December 21, 1982, the unpublished opinion of the United States Court of Appeals for the Fourth Circuit was issued affirming the District Court. The opinions of the District Court and the Court of Appeals appear in the Appendix hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit was entered

December 21, 1982. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1251 (1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

The original basis for the jurisdiction of the United States District Court was that a federal question arose under the Fifth Amendment of the Constitution of the United States. (In addition, the Complaint contained other counts, not at issue here, brought under 28 U.S.C. § 1346 (b) and 28 U.S.C. § 1346 (a)(2).)

On May 18, 1973, agents of the Internal Revenue Service simultaneously seized the assets of Petitioner Mary Epps, including a tavern known as JJ's Bar & Grill. The seizure was made pursuant to a jeopardy assessment for unpaid taxes for the years 1971 and 1972. Respondent David Baer was at that time in charge of Field Branch I of the Collection Division of the District Director's Office in Baltimore, and had the discretionary authority to release the seized tavern without filing of a bond by the taxpayer if such a release could facilitate the collection of the tax under an installment agreement. Epps, through legal counsel, repeatedly requested release of the seizure in order to allow her to continue in business, but the requests were all denied by Baer. On December 4, 1973, Baer directed agent

William Thompson to seek the opinion of Regional Counsel regarding the requested release. On December 11, 1973, Assistant Regional Counsel opined that the taxpayer's request should be denied because no bond had been filed. (It has since been conceded that, contrary to counsel's advice, there was no legal requirement for such a bond). Baer thereupon informed Epps' counsel that the seizure would not be released.

At some unknown date subsequent to December, 1973, but while the tavern was still being held by the Service, the contents of the tavern were severely vandalized and it was stipulated at trial that there was no salvagable value to that which remained after the vandalism. The seizure and its aftereffects were summarized in an IRS document dated April

10, 1978, introduced into evidence at trial:

> "Taxpayer's personal property along with her business property, bank accounts and personal automobile, were seized by the service in May 18, 1973. The seizure was the result of her assumed association with her brother "LIDDY JONES", who was arrested and charged with violation of drug laws. Since no real association was ever established between her profession, a bar owner, and her brother's profession, taxpayer's home and automobile was (sic) returned to her in March 25, 1977, some four years later. When the business property was finally released, she refused to sign the release because she strongly felt that during the time the property was in the possession of the Government, its condition deteriated (sic) to such a degree that possible reopening or sale of same was impossible. As a result of this action taxpayer underwent sporadic periods of unemployment . . ."

At trial, the legitimacy of the initial seizure itself was not at issue due to the collateral estoppel effect of a Tax Court Stipulation previously entered into by Epps.

The case was submitted to the trial court jury on the theory that Baer had violated Epps' Fifth Amendment Rights by exercising his discretion to retain (i.e. deprive her of) her property to put her out of business due to her relationship to Liddy Jones, and not for legitimate tax collection purposes. Baer's motives were evidenced by his consultation with the narcotics strike force and thereupon acting in accordance with their directives, and further evidenced by the IRS document quoted above. The jury was instructed (without objection) on the issue of qualified immunity, including, inter alia, whether or not the December 4th consultation with Regional Counsel established Baer's good faith as a matter of fact.

In her Opinion and Memorandum granting Judgment Notwithstanding Verdict,

Judge Jones found that "the evidence supports an inference that Baer's decision not to release Mrs. Epps' property was, through July 1973, made solely because of the coordinated effort involving other members of her family, not on the bases of the collection factors in her individual case (Appendix A-13) . . . and there was ample evidence in this case from which the jury could have concluded that Baer had no such good faith belief, or that his belief was not reasonable, with respect to Baer's actions in June and July 1973" (Appendix A -16). She then held, however, that Baer's subsequent consultation with Regional Counsel established his good faith as a matter of law from that point onward. Inasmuch as all but a minor portion of the physical damage to the tavern occurred after that consultation, the Trial Judge found there was no basis for the

compensatory on punitive damages.

The Fourth Circuit agreed that Baer was acting in good faith as a matter of law after December 4, 1973, but noted that the Trial Judge's opinion did not address the damages that occurred before Baer consulted legal counsel. In affirming Trial Court, the Fourth Circuit held that Baer could not have fairly been said to have known that the law forebode his conduct prior to December 4, 1973, relying on Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA CIRCUIT AS TO WHETHER ADVICE OF COUNSEL PROVIDES A COMPLETE DEFENSE OF GOOD FAITH IN A CASE INVOLVING QUALIFIED IMMUNITY.

The case of Dellums v. Powell, 566 F. 2d 167, 184 U.S. App. D. C. 275, cert. denied 98 S. Ct. 3146, 438 U.S. 916, 57 L. Ed. 2d 201 (Dist. Col. Cir. 1977), involved a claim based upon a constitutional tort wherein defendant Powell was the arresting officer of anti-war demonstrators on the Capitol steps. As in this case, a defense of good faith was presented. Chief Powell claimed that in making the arrests, he was acting on advice of counsel and therefore entitled to a directed verdict as a matter of law on the good faith defense. The Court of Appeals rejected that position, stating at 566 F. 2d 185:

"... Chief Powell would have us direct a verdict on the theory that advice of counsel is an absolute defense and that the facts show conclusively that he relied on counsel present at the Capitol. This position is untenable both as a matter of law and as a basis for directing a verdict on the facts of this case . . . Now would advice of counsel be a defense unless it

was sought in good faith. Since a directed verdict would not have been proper on the good faith issue, it follows directly that no such verdict could be given on the strength of advice of counsel."

The Fourth Circuit in its opinion below found that Baer's consultation with counsel provided him with the defense of good faith as a matter of law, even though the issue had been submitted to the trial jury as a factual one.

The conflict between the Dellums' decision and the present decision justifies the grant of Certiorari to review of Judgment below.

2. THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY WHICH CONFLICTS WITH AN APPLICABLE DECISION OF THIS COURT.

Although the Trial Judge found that there was ample evidence to support the allegation that Baer had acted in bad

faith prior to consulting counsel, the Fourth Circuit negated this finding based solely upon the recently decided case of Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982). However, in Harlow, this Court pronounced that in "defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct". Yet the Fourth Circuit summarily concluded that it was not clearly established in 1973 that it was not within the province of an experienced IRS official to use his tax collecting powers to act as an agent of the Justice Department Narcotics Strike Force or at least to subject his tax collection authority to the directives of the Strike Force. If such conduct can be said to be not previously clearly identified as being violative of a taxpayer's Constitutional Rights, then it must be assumed that Baer

objectively should have been expected to assume that he was empowered to use his tax collection authority to aid officials in any other departments of the Federal Government, regardless of the non-tax-related objectives of those other departments.

To conclude that Baer shouldn't have known that his authority was limited to tax collection and that it did not include prosecution of narcotics cases is to stretch the objective standards pronounced in Harlow to the point of absurdity.

It is respectfully suggested that the language previously quoted from the April 10, 1978, IRS memorandum is, on its face, evidence that the conduct of Baer and his subordinates was violative of Epps' Constitutional Rights in a manner that was objectively unlawful and which

should have been known to be unlawful to experienced IRS official David Baer in 1973.

Because the Fourth Circuit's interpretation of Harlow distorts this Court's standards as stated therein, Certiorari to review the Judgment below should be granted.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and opinion of the Fourth Circuit.

Respectfully submitted,

ROBERT DOUGLAS JONES
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539-0155
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this

_____day of _____, 1983, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Michael J. Roach, Counsel for the Respondent, Department of Justice, Tax Department, Washington, D. C. 20530 and that three additional copies were mailed to the Solictor General, Department of Justice, Washington, D.C. 20530.

_____
ROBERT DOUGLAS JONES

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARY EPPS	*	
Plaintiff	*	
VS.	*	CIVIL ACTION NO. J-78-2373
UNITED STATES OF AMERICA, et al.,	*	
Defendants	*	

* * * * * *

MEMORANDUM AND ORDER

R. Douglas Jones, Baltimore, Maryland, Attorney for Plaintiff. Paul R. Kramer, Deputy United States Attorney, Baltimore, Maryland and Gregory S. Hrebiniak, United States Department of Justice, Washington, D.C., Attorneys for Defendants.

The claim of Mary Epps against David Baer, Chester Ciborowski, and William C. Thompson was tried the week of September 28, 1981. Defendants' motion for directed verdict at the close of all the evidence was denied as to Thompson and Baer, but granted as to Ciborowski. The

jury returned a verdict on October 1, 1981 in favor of Thompson and against Baer, in the amount of $100,000 compensatory and $100,000 punitive damages, and judgment was entered on October 2, 1981. A timely motion for judgment notwithstanding verdict, or in the alternative for new trial, was filed October 13, 1981, and plaintiff's opposition was filed October 27, 1981.

This constitutional tort case was tried and submitted to the jury on a rather limited theory. Mary Epps was in 1973 the owner of JJ's Bar and Grill.[1] The bar equipment and the personalty was seized on May 15, 1973 pursuant to a jeopardy assessment and held by the IRS until finally released, after having been

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[1] Mrs. Epps did not own the real property at which her bar was located, but owned the liquor license and personalty for the business.

extensively vandalized, in 1978. She did not contest the jeopardy assessment or reasons for making it, the amount of income taxes owed or the seizure itself. Rather, she contested the IRS's failure to release the property so that she could operate her business and pay the taxes owed. She disclaimed any constitutional or statutory right to have the seizure lifted. The IRS often lifts seizures, however, particularly where a taxpayer's main asset is a business, in order to secure payment of taxes. Mrs. Epps contended that she has a constitutional right to nonarbitrary decision making and treatment, that IRS employees were obligated to make their admittedly discretionary decision on the basis of tax collection factors. She contended that the decision in her case was made on the basis of her relationship to John Edward

("Liddy") Jones, her brother.

Defendant Baer moved for a directed verdict at the close of all the evidence on the basis of immunity, that he could not be held liable if his "actions were a mistake in judgment on interpreting the facts or the law" (T. 276), and that there was no evidence that he had acted other than in good faith.

Defendant Baer has raised three arguments in support of his motion for judgment notwithstanding verdict:

(1) that, as a matter of law, plaintiff had no constitutional right to a fair and impartial decision on return of her property when she had no constitutional right to return of her property after seizure.

(2) that there was no evidence of bad faith or malice and defendant was thus entitled to qualified immunity as a

matter of law.

(3) that the doctrine of qualified immunity does not even apply because the acts complained of were not in obvious violation of statute or constitutional rule of law.

In support of the alternate request for new trial, defendant points to this Court's exclusion of evidence supporting an inference that Mrs. Epps was herself involved in the criminal activities of her brothers. This evidence, he contends was crucial to defendant's state of mind, whether he was acting to "preserve the security for the tax owed by a suspected narcotics traffic[k]er who had a valid jeopardy assessment made against her on her own right or whether he was acting to keep plaintiff out of business because she was related to the Jones brothers." Defendant does not assert that the verdict

was against the weight of the evidence, apparently resting on his position that the evidence was insufficient to go to the jury. Defendant does not assert that the amount of the verdict was excessive or unsupported by the evidence, nor does he challenge the awarding of punitive damages.

1. Motion for judgment notwithstanding verdict

Rule 50 of the Federal Rules of Civil Procedure permits a party to file a motion for judgment notwithstanding verdict if a motion for directed verdict has been made at the close of the evidence. F.R.Civ.P. 50(b). Denial of a motion for directed verdict is deemed a submission to the jury subject to the court's determination of the legal questions presented. Id. The rule requires that the specific grounds for a

motion for directed verdict be stated, although technical precision is not required. 9 C. Wright & A. Miller, Federal Practice and Procedure § 2533 (1971), F.R.Civ.P. 50(a). Grounds for a motion for judgment nothwithstanding verdict similarly must be stated, id. §2537 at 598. Grounds not raised in the motion for directed verdict at the close of the evidence cannot be raised in the motion for judgment notwithstanding verdict. Id.

The only ground for the motion for directed verdict at the close of the evidence was the lack of evidence for a finding of bad faith; defendant relied on Butz v. Economou, 438 U.S. 478 (1978). The first contention challenges the underlying theory of liability, the right to a fair and impartial decision on return of the property. Although discretion is

involved in the constitutional right asserted, as well as the question of immunity, the record indicates that immunity was the sole ground of the motion at the close of the evidence. The first contention cannot be considered. Likewise, if defendant's third contention is intended to assert that Baer is entitled to absolute immunity, as plaintiff asserts, it cannot be considered. Even if defendant's motion for directed verdict is viewed as raising the general questions of immunity, it is clear that Baer is not in the category of officials entitled to absolute immunity.

Baer's involvement with the Epps case began sometime in May 1973, with discussions that jeopardy assessments for her and four other members of the Liddy Jones family were "on the way." (T. 114-15). Baer directed Thomas Byrne to

organize a team of revenue officers to record and serve the assessments and seize the property (T. 115-16). Baer was aware that the cases of Mary Epps and the others had a "narcotics aspect" (T. 117, 123)[2]/ and that the taxpayers were realted to Liddy Jones (D. Ex. 12, entry of 5/18/73, T. 127-28).

Baer met with plaintiff, C. William Lawrence, her accountant, and Thompson on May 21, 1973, after Epps and her accountant had first met with Thompson and Byrne. The concern at this meeting was the reason for the seizure of the property (P. Ex. 5B).

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[2]/ The other taxpayers involved were Baxter, George and Robert Jones and Brenda Pinkert. Liddy, Robert, and Baxter Jones had been indicted on May 3, 1973 for offenses involving the manufacture and distribution of heroin. Nothing in the trial testimony or exhibits indicates that Baer had seen the indictment.

Baer and Thompson met with David Scher, plaintiff's attorney on May 25, 1973. Scher was to complete a financial statement and request that the Epps property be released. Baer, according to Thompson's notes, advised that the request would be given consideration based on the statement and the "joint decision of the other segments of the IRS who are involved in this case. . . ." (P. Ex. 5C).

On June 19, 1973, Baer, Thompson and Byrne met with Epps' attorney, William Holden, to discuss release of the tavern property from the seizure, since the statement showed enough equity in other assets to collect the tax assessed. Holden was told, it is not clear by whom, that the statement would be checked and if the equity shown was correct, the request would be considered. "Mr. Baer, however, advised Holden that such release was

dependent upon approval by other segments of IRS and Higher Authority, due to sensitive nature of the case." (P. Ex. 5D). Thompson testified that "Higher Authority" referred to the Strike Force. After information was secured, Baer and Thompson again met with Holden on July 2, 1973. Someone pointed out that Mrs. Epps' mother had a life estate with full power of disposal on one of the listed real properties and that she would have to join in a mortgage to the IRS to secure the taxes. "However, before any consideration or solicitation of the opinion of the 'Strike Force' will be sought, Mary Epps and the others will have to voluntarily open the seized safe deposit boxes for inventory." (P. Ex. 5F).[3]/ Holden was to

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[3]/ The IRS had levied on the contents of a safe deposit box of Mary Epps at Equitable Trust Company.

contact his client and advise; the safe deposit box was opened July 6, 1973 and its contents released from seizure.

On July 9, 1973, Thompson told Baer of the release of the safe deposit box and apparently raised the question of releasing the tavern property. Baer told him to get the opinion of the Strike Force. Thompson met with two members of the Strike Force and was told they would not recommend release of seizure; he testified that he was told only that it would not be in the best interest of the Government. (P. Ex. 5F). He told Baer and Holden of the determination not to release the property. (P. Ex. 5F, 6).

Louis Hoffman, plaintiff's attorney, contacted IRS regional counsel on November 5, 1973, who met with him and relayed the call to Thompson. Thompson told Hoffman the Government had previously

turned down the request, but Hoffman wrote (D. 15) anyway. Thompson was told by Baer on November 30, 1973 to request an opinion from regional counsel. (D. 12). Counsel found the proposal defective for lack of a bond (D. 18), and Baer wrote Hoffman of the opinion (D. 19). The IRS files (D. 12) indicate no further involvement of Baer except his instructions to Ciborowski to follow regional counsel's advice on possible sale and release of the Epps' property.

Baer had little recollection of the events involved. He testified that he never personally consulted with the Strike Force, and he did not remember whether he told anyone else to do so.

The evidence supports an inference that Baer's decision not to release Mrs. Epps' property was, through July 1973, made solely because of the

coordinated effort involving other members of her family, not on the basis of the collection factors in her individual case. Baer's instruction to Thompson to consult the Strike Force and his remarks to Holden clearly support that inference. Baer testified that he believed such consultation was proper or permissible and that it was often done. The validity of that belief is the heart of the immunity issue in this case.

In November of 1973 Baer directed Thompson to secure the regional counsel's opinion on Hoffman's proposal for release of Mrs. Epps' property and relied on it in conditioning the release on posting of a bond.[4/] Whatever its merits, there is nothing to indicate his

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[4/] Regional counsel seems to have been in error in concluding that Mrs. Epps' business property could not be released from seizure unless she posted a bond in the amount of taxes due.

lack of good faith in relying on it. The question thus arises whether, even assuming Baer acted in bad faith initially, his later decision to consult counsel and reliance on counsel's opinion in effect "cured" his earlier actions, particularly since other evidence indicates that, except for some damage from a burst coil that occurred in or prior to July 1973, the property was then in decent condition.

Under the doctrine of qualified immunity, an official is immune from liability for actions within the scope of his authority unless he knew or should have known that his actions violated constitutional rights. Butz v. Economou, 438 U.S. 478, 507 (1978); Withers v. Levine, 615 F.2d 158, 163 (4th Cir. 1980). The test is one of a subjective good faith belief, reasonably held. Street v.

Cherba, No. 80-6611 (4th Cir. Oct. 1, 1981). An individual's testimony about his own beliefs is obviously self-serving, see id., slip op. at 5 n. 4, and there was ample evidence in this case from which the jury could have concluded that Baer had no such good faith belief, or that his belief was not reasonable, with respect to Baer's actions in June and July 1973.

His actions in November 1973 stand on a different footing. Counsel for Mrs. Epps had made his initial contact with regional counsel, who relayed the request to Thompson, and offered to supply an opinion, if needed. Baer advised Thompson to request the opinion and relied on it in denying the request for release of the property and further advised Ciborowski to follow counsel's instructions. Baer was proceeding properly at this point, and it was not

until after this point that plaintiff's property was damaged. Defendant's motion for judgment notwithstanding verdict must be granted.

3. Alternative request for new trial

Rule 50(c) requires a conditional ruling on the alternative request for new trial, where a motion for judgment notwithstanding verdict is granted. Defendant has moved for new trial on the basis of exclusion of evidence relating to plaintiff's alleged criminal activities. A sentence in a IRS memorandum (D. Ex. 1), that the taxpayer was "presently under indictment for conspiracy to violate the Federal Narcotics Law," and the indictment of John Edward ("Liddy") Jones, which names Mary Epps as an unindicted co-conspirator, were excluded, and counsel for defendant was prevented from cross-examining Mrs. Epps

concerning the reasons for the making of the jeopardy assessment. Defendant contends that this evidence should have gone to the jury as evidence of Baer's state of mind in making his decision and that exclusion created a false impression of her as not in any way connected with her brothers' criminal activities. The sentence in D. Ex. 1 was excluded because it was incorrect and its prejudice outweighed its probative value. The bulk of the IRS memo, of which Baer was aware, was admitted into evidence, and it contains the statement that the Bureau of Narcotics and Dangerous Drugs had information that JJ's Tavern was a contact point in the Liddy Jones operation. Plaintiff testified on direct examination in response to careful questioning that she had never been charged with or convicted of a crime. At the outset of

trial plaintiff conceded the validity of the jeopardy assessment and its amount and the amount of tax determined in the Tax Court proceeding. Those concessions may have been made as a matter of trial tactics, but they did remove from consideration the underlying issues of the reasons for the jeopardy assessment and the basis for plaintiff's tax liability. Though testimony and evidence in IRS reports, it was brought out that Mary Epps was suspected of involvement in the criminal activities of her brothers and that this was the basis for making the jeopardy assessment. While I agree with defendant's counsel that the thrust of plaintiff's counsel's presentation was to depict plaintiff as a complete innocent, plaintiff's attorney carefully limited his statements to the facts that she was never charged or convicted. Evidence was

introduced of the allegations against her at the time, however, to enable defendant to present his contentions on his state of mind at the time. I decline to grant a new trial for the reasons stated by defendant.

S/

Shirley B. Jones
United States District Judge

Dated: March 15, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARY EPPS	*	
Plaintiff	*	
VS.	*	CIVIL ACTION NO. J-78-2373
UNITED STATES OF AMERICA, et al.,	*	
Defendants	*	

* * * * * * * *

ORDER

For the reasons contained in the foregoing Memorandum, it is, this 15 day of March, 1982, by the United States District Court for the District of Maryland, hereby

ORDERED:

1. That defendant's motion for judgment motwithstanding verdict be, and the same hereby is, GRANTED. Judgment shall be entered in favor of defendant Baer.

2. That defendant's alternative request for new trial be, and the same hereby is, DENIED.

3. That the Clerk shall mail copies of this Memorandum and Order to all counsel.

S/
Shirley B. Jones
United States District Judge

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNPUBLISHED

No. 82-1350

Mary Epps, Appellant,

-V-

David Baer, Individually, Appellee,

and

United States of America;
William C. Thompson;
Chester Ciberoski, Defendants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Shirley B. Jones, Judge.

Argued November 9, 1982 Decided December 21, 1982

Before WINTER, Chief Judge, CHAPMAN, Circuit Judge, and BUTZNER, Senior Circuit Judge.

R. Douglas Jones for appellant; Michael J. Roach, Tax Division, Dept. of Justice (Glenn L. Archer, Jr., Assistant Attorney General; J. Frederick Motz, United States Attorney; Michael L. Paup, Jonathan S. Cohen, Tax Division, Dept. of Justice on brief) for appellee.

PER CURIAM:

Mary Epps' business, JJ's Bar and Grill, was seized by the Internal Revenue Service under the direction of David Baer, a revenue officer, pursuant to a valid jeopardy assessment. Her property was held by the government for nearly five years and during that time suffered damage from vandalism. Sale of the property during much of this period was stayed by proceedings in the Tax Court.

Epps sued Baer for the damage to her property and business, including loss of profits, and for punitive damages. She alleged that his refusal to release her property was arbitrary and capricious,

violating her fifth amendment right to due process. Specifically, she contended that Baer's refusal was based on her relation to John Edward ("Liddy") Jones, her brother and a reputed drug dealer. Evidence introduced at trial showed that Baer, through a subordinate, had in fact consulted with a special narcotics strike force during the course of his deliberation on Epps's request for the release of her property. The strike force recommended against release. Baer later requested the advice of the Regional Counsel for the Internal Revenue Service and on that advice informed Eqqs that her property would be released on the posting of a bond to ensure collection. Epps did not post a bond.'

The case was tried to a jury on the theory of qualified immunity. A verdict for $100,000 compensatory and

$100,000 punitive damages was returned for the plaintiff. On Baer's motion, however, the trial judge granted judgment notwithstanding the verdict. The trial judge held that Baer was entitled to the defense of qualified immunity for his actions after he consulted the Service's legal counsel and followed his advice. We find no error in this reasoning, but we note that it does not fully address Epps' claim for damages that occurred before Baer consulted legal counsel.

After the entry of the district court's judgment, the Supreme Court decided Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982), holding that "government officials performing discretionary functions generally are shielded from liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a

reasonable person would have known." 102 S. Ct. at 2738. The Court explained that "[i]f the law at that time was not clearly established, an official could not reasonable be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." 102 S. Ct. at 2739.

Baer's actions in consulting with the strike force and refusing to release Epps' property were discretionary acts. His decision to seek all information he deemed pertinent to the collection of delinquent taxes did not violate any clearly established statutory or constitutional rights. Thus, measured by the objective standards prescribed by Harlow, Baer's actions prior to consulting with the Service's legal counsel are also shielded by the defense of qualified

immunity.

AFFIRMED.

No. 82-1548

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARY J. EPPS, PETITIONER

v.

DAVID BAER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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Harlow v. *Fitzgerald*, No. 80-945 (June 24, 1982) 3, 4, 5

Statute:

Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)):

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Section 6103(i)(2) 5
Section 6343(a) 2

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1548

MARY J. EPPS, PETITIONER

v.

DAVID BAER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner brought this action for damages against David Baer, an employee of the Internal Revenue Service who was responsible for the seizure and retention of petitioner's property for unpaid taxes. She seeks review of the decision below awarding judgment in favor of respondent Baer notwithstanding the verdict on the ground that his action in refusing to release the government's levy and declining to return petitioner's property prior to the payment of the taxes due was taken on the advice of counsel and within a reasonable time after petitioner requested the return of her property.

The pertinent facts may be summarized as follows: In 1973, petitioner was the owner of J.J.'s Bar and Grill in Baltimore (Pet. App. A-2). On May 18, 1973, officers of the Internal Revenue Service, acting pursuant to a jeopardy assessment, seized the personal property and equipment located at petitioner's place of business and padlocked the

premises (Pet. App. A-2; J.A. 56-59).[1] Petitioner conceded that this jeopardy assessment was valid and that she had no constitutional or statutory right to the release of the levy. In 1973, petitioner applied on two occasions for discretionary release of the seized property prior to payment of the taxes due so that she could reopen the business and pay off the tax liability in installments (Pet. App. A-10 to A-12). After the second of these requests, respondent requested one of his subordinates to seek an opinion from the Regional Counsel of the Internal Revenue Service whether petitioner's application should be granted and the seizure lifted. The IRS Regional Counsel concluded that the application did not offer adequate protection to the government because it did not provide for the posting of a bond to secure payment of the taxes (Pet. App. A-13).[2]

No bond was posted and the property remained under seizure until 1978, when it was released, after having been extensively vandalized (Pet. App. A-2 to A-3). Petitioner thereafter brought this damages action in the United States District Court for the District of Maryland, against respondent and several other Internal Revenue Service officials who participated in the tax levy and in the consideration of petitioner's requests for the release of that levy (Pet. App. A-1). Petitioner alleged that respondent's refusal to release

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[1]"J.A." refers to the joint appendix filed in the court of appeals.

[2]Petitioner contends (Pet. 4) that no bond was required for respondent to exercise his discretionary authority under Section 6343(a) of the Internal Revenue Code of 1954 (26 U.S.C.) to release the levy and return her property. However, the exercise of authority under Section 6343(a) is contingent upon a finding that release of the property will facilitate collection of the liability. Here, in a case in which collection of the liability had been found to be in jeopardy, the Regional Counsel might well have concluded that petitioner's property should not be returned without some assurance, in the form of a bond, that the taxes for which it had been seized would ultimately be paid.

the property was arbitrary and capricious and violated her right to due process (Pet. App. B-2 to B-3). The case against respondent and two other Internal Revenue officials went to trial before a jury. One of the other defendants was granted a directed verdict, and the other was awarded a jury verdict in his favor (Pet. App. A-1 to A-2). The jury, however, found against respondent, and awarded $100,000 in compensatory damages and $100,000 in punitive damages to petitioner (Pet. App. A-2). The district court granted respondent's motion for judgment notwithstanding the verdict. The court found that while there was enough evidence in the record to support the conclusion of the jury that respondent had not acted in good faith in refusing petitioner's initial request for the return of the seized property, there was no support for its conclusion that respondent's rejection of petitioner's second request for the return of the property was not made in good faith (Pet. App. A-13 to A-17). In so ruling, the court found that respondent proceeded properly. As the court pointed out, before acting on this second request, respondent had sought the advice of Regional Counsel, and had relied on that advice in refusing to return the property to the petitioner unless she posted a bond (Pet. App. A-14). Since petitioner's property was not damaged until after respondent's second refusal to return the property, it concluded that respondent's earlier conduct could not have been the cause of her loss.

The court of appeals affirmed. The court held that under the objective standards for qualified immunity established by this Court in *Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982), respondent was immune from liability for damages because none of his actions in connection with the levy on petitioner's business violated any of her clearly established statutory or constitutional rights (Pet. App. B-4 to B-5).

1. Petitioner contends (Pet. 8-10) that the decision below conflicts with *Dellums* v. *Powell*, 566 F.2d 167 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978). In *Dellums* v. *Powell, supra*, 566 F.2d at 185-186, the court of appeals upheld the refusal of a district court to direct a verdict in favor of the Chief of the United States Capitol Police based on the fact that he had consulted an attorney before arresting certain demonstrators on the Capitol grounds. The court found that there was a jury question as to whether the defendant had consulted counsel in good faith, and as to whether he had informed his counsel that the Speaker of the House of Representatives had suspended the rule forbidding such demonstrations before any arrests were made. *Id.* at 177, 184-186. Here, on the other hand, the district court found that there was no evidence to suggest that respondent did not act in good faith in requesting and relying upon the opinion of the IRS Regional Counsel as to the conditions to be imposed before the government would consent to return petitioner's property, which, as the petitioner conceded, had been lawfully seized for the payment of her taxes (Pet. App. A-3, A-14 to A-15). *Dellums* is therefore distinguishable.

2. Petitioner further contends (Pet. 10-13) that the decision below conflicts with this Court's decision in *Harlow* v. *Fitzgerald, supra*. In *Harlow*, this Court pointed out that inquiries into the subjective good faith of government officials in civil damage actions had resulted in substantial disruption of the government because such inquiries tended to subject the officials involved to wide ranging discovery, including intrusive questioning concerning their thought processes and communications with other persons involved in formulating government policy. To prevent this type of abuse, the Court held that "officials performing discretionary functions generally are shielded from liability for civil

damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (slip op. 17).

The court of appeals correctly applied this standard to the present case. The evidence introduced at trial showed that respondent, through a subordinate, had consulted with a special narcotics strike force during the course of his deliberation on petitioner's request for the release of her property. He did so because petitioner was the sister of John Edward ("Liddy") Jones, a reputed drug dealer. The strike force recommended against release. Respondent thereafter requested the advice of the IRS Regional Counsel and on that advice informed petitioner that her property would be released on the posting of a bond to insure collection (Pet. App. B-3).

Contrary to petitioner's argument (Pet. 11), respondent's consultation with the Organized Crime Strike Force of the Department of Justice was entirely proper. As the court of appeals pointed out, respondent's efforts to seek all information he deemed pertinent to the collection of petitioner's delinquent taxes were discretionary acts that did not violate any clearly established statutory or constitutional rights (Pet. App. B-5).[3] Thus, under the objective standard of *Harlow* v. *Fitzgerald*, *supra*, respondent's actions prior to consulting with the IRS legal counsel were shielded by the defense of qualified immunity. The courts below therefore properly awarded judgment in favor of respondent notwithstanding the verdict.

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[3]Cf. Section 6103(i) (1) and (2) of the 1954 Code (effective Jan. 1, 1977) for subsequently enacted legislative restrictions on the disclosure of "return information" and "taxpayer return information" in connection with the investigation of federal crimes not relating to tax administration.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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